VCB CAPITAL SDN BHD v. SURUHANJAYA SEKURITI MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIAL REVIEW NO: WA-25-560-12-2019]
10 JANUARY 2022

Abstract – *The Securities Commission ('SC'), in the exercise of its powers within the ambit of the Capital Market and Services Act 2007 and in accordance with its statutory functions, has the power to revoke a capital market services license ('CMSL') with immediate effect if it finds there are serious breaches by a licensed fund management firm in order to protect the interest of investors or public interest. The SC may stipulate that any revocation of the CMSL shall take effect immediately on any date specified by the SC.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Judicial review against decision of Securities Commission ('SC') – Revocation of capital market services license ('CMSL') – Alleged breaches of provisions of Capital Markets and Services Act 2007 ('CMSA'), Compliance Guidelines and Guidelines on Prevention of Money Laundering and Terrorism Financing for Capital Market Intermediaries – Applicant's CMSL revoked – Whether there were sufficient grounds to revoke CMSL – Whether applicant fit and proper to continue holding CMSL – Whether SC exercised its powers within ambit of CMSA and in accordance with statutory functions – Whether there had been any error of law, disproportionate and/or irrationality by SC – Whether judicial review warranted – Rules of Court 2012, O. 53*

SECURITIES: *Securities Commission – Revocation of capital market services license ('CMSL') – Alleged breaches of provisions of Capital Markets and Services Act 2007 ('CMSA'), Compliance Guidelines and Guidelines on Prevention of Money Laundering and Terrorism Financing for Capital Market Intermediaries – Applicant's CMSL revoked – Whether there were sufficient grounds to revoke CMSL – Whether applicant fit and proper to continue holding CMSL – Whether SC exercised its powers within ambit of CMSA and in accordance with statutory functions*

The applicant was a licensed fund management firm and had held a capital market services license ('CMSL') which was granted by the respondent. Under the CMSL, the applicant was allowed to manage and deal in securities and derivatives. The respondent issued a letter of notice to show cause ('respondent's notice to show cause') to the applicant for the alleged breaches of: (i) section 72(2)(a)(i) of the CMSA read together with ss. 64(1)(j) and

A 64(1)(h)(v) of the Capital Markets and Services Act 2007 ('CMSA'); (ii) compliance guidelines; and (iii) s. 356(1)(a) of the CMSA read together with the Guidelines on Prevention of Money Laundering and Terrorism Financing for Capital Market Intermediaries ('AML Guidelines'). The applicant replied to address and clarified the issues raised by the respondent B ('applicant's reply to show cause'). After a lapse of eight months from the date of the applicant's reply to the respondent, the respondent revoked the applicant's CMSL ('revocation letter'). The revocation was to take effect from the date of the revocation letter and the applicant had to shut down its business with immediate effect. Dissatisfied, the applicant made a two- C pronged appeal against the respondent's decision where an appeal was made to the respondent and another appeal was made to the Minister of Finance ('Minister'). The applicant then highlighted to the respondent that the revocation would only take effect after the disposal of the applicant's appeal and/or review by the Minister. A letter was also sent to the respondent seeking the respondent's confirmation on the applicability of s. 80(3) of the D CMSA but there was no response by the respondent. The applicant issued another letter to the respondent, stating that the applicant deemed the stay of revocation of the applicant's CMSL to be in effect pending the disposal of the applicant's appeal as there was no reply and/or response. The respondent responded to the applicant's letters and stated that: (i) since the E applicant's CMSL was for fund management, the applicant's appeal would be reviewed by the respondent, not the Minister; and (ii) the revocation letter invoked s. 80(4) of the CMSA and stated that the revocation was to take effect on 19 June 2019 notwithstanding any appeal made under s. 80(3) of the CMSA and thus, there was no stay of the revocation pending disposal of F the applicant's appeal. The applicant filed an originating summons ('OS') at the High Court, against the respondent for, amongst others, a declaration that the applicant was entitled for a stay of revocation of its CMSL pending the disposal of its appeals to both the respondent and the Minister. The applicant also filed an *ex parte* application for interlocutory injunction to injunct the G respondent from forcing the applicant to shut down its business with immediate effect. The *ex parte* injunction application was heard *inter parte* and was dismissed. As a result, the applicant was forced to shut down its business and comply with the revocation letter with immediate effect despite the fact that the two appeals were still pending disposal. Meanwhile, the respondent filed a striking out application to strike out the applicant's OS on the basis H that the applicant should pursue its cause of action *via* judicial review. The respondent's striking out application was allowed. At the same time, the respondent dismissed the applicant's appeal against the revocation of the CMSL. Hence, this judicial review application pursuant to O. 53 of the Rules of Court 2012, seeking to challenge the respondent's decision. The applicant

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submitted that the respondent's decision was tainted with bad faith based on the following grounds: (i) the respondent took more than eight months after issuing the notice to show cause to revoke the applicant's CMSL; (ii) the applicant tried numerous times to appoint a qualified and competent individual into the applicant's workforce. However, these applications were either rejected and/or the applicant was asked to withdraw the application without proper consideration and with no good reason; (iii) there was no stay of revocation of the applicant's CMSL notwithstanding any appeal made by the applicant under s. 80(3) of the CMSA; (iv) the respondent had decided that revocation should take immediate effect on 19 June 2019 notwithstanding that the applicant had the option to file an appeal to the respondent; and (v) the respondent had revoked the applicant's CMSL despite it having lifted the directives imposed on the applicant pursuant to s. 125 of the CMSA in May 2014 as there were no sufficient grounds to revoke the applicant's CMSL at that time.

Held (dismissing judicial review application):

(1) The CMSA does not stipulate a time frame within which the respondent must complete its deliberation on the applicant's explanation in response to show cause and notify the applicant of its decision. Since the nature of the applicant's breaches were of such a serious nature to warrant a revocation of the applicant's CMSL, time was required by the respondent to consider all the facts and explanation given by the applicant prior to making the decision to revoke the applicant's CMSL. The applicant also failed to establish any prejudice it suffered as a result of the purported delay. In fact, the applicant was entitled to carry out the operations during the eight months period. The eight months period between the issuance of the notice to show cause and the revocation was not a ground for holding that there had been bad faith and/or procedural impropriety by the respondent. (paras 34-36 & 39)

(2) The respondent had set out the chronology of events in relation to the applicant's application and the reasons for not approving the processing of the same. The respondent did not process the applicant's application for the appointment of various personnel in order to maintain the *status quo* and to protect the integrity of the administrative action process. The notice of revocation of the applicant's CMSL appeal decision letter was premised on: (i) poor assessment of investment decisions; (ii) failure to conduct itself in a professional manner in its dealings with the respondent; and (iii) the failure to act with due care, skill and diligence in the manner in which it conducted itself as a licensed fund manager. Therefore, it was clear that the issue of qualified personnel was not the sole ground relied on by the respondent in the revocation of the applicant's CMSL. (paras 44-47)

(3) Based on s. 80(4) of the CMSA, the respondent may stipulate that any revocation of the CMSL shall take effect immediately on any date specified by the respondent if it was of the opinion that it was for the interest of investors or public interest. Regardless of s. 80(3) of the CMSA, the respondent may exercise its discretion to invoke s. 80(4) of the CMSA if it was of the opinion that it was necessary in the interest of investors or public interest. Section 80(4) of the CMSA overrides the general position of s. 80(3) for the automatic stay. As a result, there was no stay of the revocation. The applicant's CMSL was for the regulated activity of fund management only. The applicant did not have any CMSL for the regulated activities of dealing in securities and/or derivatives. Therefore, the applicant was not entitled to the appeal mechanism under s. 80(2) of the CMSA to file an appeal to the Minister. The appeal mechanism under s. 80(2) of the CMSA was only applicable to a holder of CMSL for dealing in securities or dealing in derivatives whose license was revoked by the respondent. (paras 50 & 53-56)

(4) The respondent had lifted the directives imposed on the applicant pursuant to s. 125 of the CMSA by way of a written notice on 15 May 2015. The respondent had, in the said notice, reminded the applicant 'to ensure continuous compliance with the guidelines on compliance functions for fund management companies, securities laws and all relevant regulatory requirements'. The applicant failed to act in the interest of its client. This failure, coupled with the various breaches by the applicant, led to the respondent's decision of revoking the applicant's CMSL with immediate effect. (paras 73-76)

(5) The respondent was vested with the power to revoke the applicant's CMSL, under s. 72(2)(a)(i) of the CMSA, as the respondent had found that the applicant was no longer fit and proper to continue holding the CMSL. Based on the serious breaches of the CMSA, Compliance Guidelines and the AML Guidelines committed by the applicant, the revocation of the applicant's CMSL was proportionate. The respondent had exercised its powers within the ambit of the CMSA and in accordance with the respondent's statutory functions. There had not been any error of law, disproportionate and/or irrationality by the respondent in imposing the revocation and arriving at the respondent's appeal decision. (paras 68, 69, 72 & 84)

Case(s) referred to:

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(refd)***

Council of Civil Service Unions & Ors (CCSU) v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Dato' Dr Mohamad Rameez Yahaya v. Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No 1) & Anor [2019] 1 LNS 1027 HC ***(refd)***

Dato' Low Tuck Choy v. Bursa Malaysia Bhd [2012] 9 CLJ 119 HC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case [2012] 7 CLJ 407 HC ***(refd)***
Koon Hoi Chow v. Pretam Singh [1972] 1 LNS 56 HC ***(refd)***
Lembaga Jurutera Malaysia v. Leong Pui Kun [2008] 6 CLJ 93 FC ***(refd)***
Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***
Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***
Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***
R Rama Chandran v. Industrial Court Of Malaysia [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Tenaga Nasional Bhd v. Majlis Daerah Dungun [2009] 4 CLJ 385 FC ***(refd)***
Tun Dr Mahathir Mohamad v. Datuk Seri Mohd Najib Tun Hj Abdul Razak & Ors And Another Case [2018] 8 CLJ 259 HC ***(refd)***

Legislation referred to:
Capital Markets and Services Act 2007, ss. 61, 64(1)(h)(v), (j), 72(2)(a)(i), 80(1), (2), (3), (4), 125, 356(1)(a), (2)
Courts of Judicature Act 1964, Schedule para. 1
Government Proceedings Act 1956, s. 33(1), (3)
Rules of Court 2012, O. 53 rr. 1(2), 2(3), 3(2), 5
Securities Commission Malaysia Act 1993, s. 152A(a), (g)
Specific Relief Act 1950, s. 44

For the applicant - Lim Kian Leong, Lui Kar Yee & Chuar Kia Lin; M/s Lim Kian Leong & Co
For the respondent - Lee Shih & Joyce Lam Hwee Yin; M/s Lim Chee Wee Partnership

Reported by Lina E

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The applicant had filed an application for judicial review proceedings (encl. 14) pursuant to O. 53 of the Rules of Court 2012 ("ROC 2012"). The leave was granted by this court on 8 January 2020.

[2] The applicant is seeking the following reliefs:

(i) an order of *certiorari* to move this Honourable Court to quash the respondent's decision given on 17 September 2019 in dismissing the applicant's appeal dated 26 June 2019 (the applicant's appeal) to the respondent against the respondent's decision to revoke the applicant's

A Capital Market Services License (CMSL) on 19 June 2019 (the said decision) whereby the respondent found and concluded that the applicant was in breach of ss. 72(2)(a)(i) and 356(2) of the Capital Markets and Services Act 2007 (CMSA 2007);

(ii) an order of *mandamu*s directing the respondent to allow the applicant's appeal and to reinstate the applicant's CMSL under the CMSA 2007 with immediate effect;

(iii) a declaration that the respondent's decision in refusing the stay of the revocation of the applicant's CMSL pending the disposal of the appeal dated 26 June 2019 to the Minister of Finance was *ultra vires* and/or illegal and/or made in bad faith;

(iv) a declaration that the said decision was tainted with procedural impropriety, in breach of natural justice and unreasonable due *inter alia* to the:

(a) respondent's refusal to put due weight and consideration to the relevant evidence;

(b) respondent's refusal to consider and/or put sufficient weight to the changes and/or amendments and/or updates made by the applicant; and

(c) respondent unreasonably relied on irrelevant and inconsequential evidence in coming up with the said decision.

(v) a declaration that the said decision was unreasonable and/or irrational and/or disproportionate and/or without basis;

(vi) an order by this court against the respondent to award a monetary compensation to be assessed to the applicant pursuant to O. 53 r. 2(3) and damages to be assessed under O. 53 r. 5 of the ROC 2012 in respect *inter alia* of loss and damage arising from the revocation of the CMSL and the refusal of stay of the applicant's appeal;

(vii) an order that costs of and incidental to this application be costs in the cause; and

(viii) such other or further reliefs as this court deems fit and appropriate.

[3] Based on the statement, the applicant seeks to challenge the respondent's decision on the following grounds:

(i) The respondent's decision in revoking the applicant's CMSL was a decision which in all the circumstances of the case, was made in bad faith and maliciously and was one that no other person or commission in similar circumstances acting in good faith would have arrived at and/or plainly was unreasonable and/or irrational and/or disproportionate in that:

(a) The respondent erred in holding that the applicant was in breach of s. 64(1)(j) of the CMSA 2007 as the reasons provided by the applicant in utilising its shareholders' fund (SHF) to purchase a residential property located in Kelab Golf Sultan Abdul Aziz Shah (KGSAAS) Shah Alam, Selangor (the property) for the price of RM3 million *via* the sale and purchase agreement dated 11 September 2017 are unjustifiable on the grounds that the location of the property is in a residential area and its uncompleted status when failing to consider the following facts:

(1) The applicant has complied with the SHF requirement at all material times by ensuring that the SHF was maintained above the required threshold of RM2 million;

(2) The Board of Directors of the applicant deemed that such investment was in the best interest of the applicant in that it will ensure growth and sustainability of the SHF remains;

(3) The respondent was already informed and it was explained in detail that the property was a completed show unit and rental income will be generated once it is handed over by the developer;

(4) The respondent was also informed and it was explained that the applicant was anticipating capital gain through this investment; and

(5) The applicant had also informed the respondent and explained that should the applicant decide to use the property as its own office, it would obtain all the necessary approval to do the same; and

(b) The respondent erred in holding that the applicant failed to comply with the Guidelines on Prevention of Money Laundering and Terrorism Financing for Capital Market Intermediaries (AML Guidelines) in commencing business relationships with seven private mandate clients without performing satisfactory risk profiling and Customer Due Diligence (CDD) and failed to undertake relevant CDD measures to verify the clients' investments and the applicant's knowledge of the respective background, risk profile and investment objectives when failing to consider the following facts:

(1) These seven clients were investors of underlying assets namely securities that were listed on Nasdaq in February 2018 hence had already undergone a required disclosure and due diligence process by the financial advisers and Nasdaq;

(2) The applicant did not find any information that suggests high-risk customer identification during the Know-Your-Client (KYC) process that would cause Enhanced Customer Due Diligence process to be initiated;

(3) Nevertheless, the applicant applied more than requisite due diligence exercise throughout the course of business relationship with all the clients and there was not a single update discovered on the clients' information or client profile that led to the applicant to place any one of them as high-risk customers for AML;

(4) Further, these customers were only on boarded by the applicant, in February 2018 and barely eight months later even without any single movement in assets (disposal or acquisition) for any of the clients, the respondent had issued a show cause letter on 16 October 2018 alleging various AML failings by the company;

(5) One of the non-discretionary private mandate clients is the founder of the Nasdaq listed company, while the other is the estate of the chairman of the company;

(6) The applicant, as a licensed fund manager, had established access to the platform that manages global listed equities whereby the Board of Directors of the said Nasdaq listed company recommended the applicant to the clients for the sole purpose of holding their equities for and on behalf of them. The applicant was looking forward to managing non-discretionary accounts for hundreds of shareholders in the future and expecting to earn potential fees of millions of ringgit;

(7) The Executive Director of the applicant conducted face-to-face meetings with all of these clients and had applied her mind and was satisfied with the customer risk factors and concluded that the standard KYC and CDD processes were sufficient;

(8) The applicant strongly believed that its relationship with these clients may lead to other discretionary portfolio management businesses in the future; and

(9) None of these clients is Politically Exposed Person (PEPs) or listed on any blacklists, or from high-risk countries;

(c) The respondent erred in holding that the applicant was in breach of s. 64(1)(h)(v) of the CMSA 2007 read together with paras. 4.02(h), (g), (k) and (o) of the Guidelines on Compliance Function for Fund

Management Companies (Compliance Guidelines) in failing repeatedly to act in the best interest of the applicant's client in 2010 where investments were made into private equity and into companies linked to each other. The respondent had taken a stance that these investments are considered high-risk investments and did not match its investors' risk profile (low to medium risk), resulting in the respondent's imposition of directives under s. 125 of the CMSA 2007 in 2012, while failing to consider the following facts:

(1) With the full awareness of investment into private equity, the applicant had ensured that the investment risks were mitigated to the lowest level with risk-mitigating structure;

(2) In fact, with proven successful risk mitigating structure, all of the applicant's clients were profiting from the investment to an extent acceptable to them;

(3) The applicant had met 100% of its clients' requirements and they had received their targeted dividends;

(4) Not a single client of the applicant had lost any of their investment capital and 100% of their capital was returned together with the anticipated returns; and

(5) Not a single client of the applicant had raised any complaint of any dissatisfaction in relation to the performance of the applicant.

(d) The respondent erred in holding that the applicant was in breach of s. 64(1)(h)(v) of the CMSA 2007 read together with paras. 4.02(h), (g), (k) and (o) of the Compliance Guidelines in 2015 when the entire Asset Under Management (AUM) for its wholesale fund was invested into a third party wholesale money market fund giving lower returns of 1.75% p.a. compared to that of fixed deposits at 3% p.a., which was inconsistent with the applicant's investment mandate plus the interest of the investor was not protected as the funds' net asset value had been declining when failing to consider the following facts:

(1) The investment at all material times was done with the prior consent of the sole client;

(2) The respondent had already been informed and explained that the overall fund was too small to enter into equity market pending anticipation of new investors and/or investments and thus the funds were placed in a money market instrument instead;

A (3) The applicant's investment in the money market fund *via* fixed deposit was based on the premise that while placement in fixed deposit was not subject to any fees but any early withdrawal might attract penalty in form of losing the entire accrued interest;

B (4) At the point of investment, the fund had an indicative rate of 3.5% p.a. and at the same time allowed daily liquidity as compared to fixed deposit which may charge a penalty in the event of an early redemption and any short-term placements would also attract very low yield from the banks;

C (5) Whilst the return was lower than the fixed deposit rate, it was a profit nonetheless and the client did not suffer any losses at all; and

(6) The client was fully aware of the situation and had decided to
D continue in its position in the fund despite all the discussions the applicant had with him and the fact is that the client was happy with the profit coupled with the flexibility as compared with fixed deposits.

(e) The respondent erred in holding that the applicant had poorly
E implemented its policies and procedures (P&P) to ensure full regulatory compliance when failing to consider that the applicant had always been constantly reviewing its P&P to incorporate new guidelines and its operational requirements;

(f) The respondent erred in holding that the applicant failed to conduct
F itself in a professional manner in its dealings with the respondent as the applicant failed to provide readily available records in a timely and complete manner despite numerous follow-ups, when failing to consider the fact that the applicant had always endeavoured to provide 100% of the respondent's requests and whenever the
G respondent had more questions and/or requests, the applicant would respond promptly to follow up and re-provided any information required and asked if necessary;

(g) The respondent erred in holding that the applicant lacked competence and skill to carry out the function of a fund management
H company and failed to act in the best interest of its clients when failing to consider the following facts:

(1) The applicant had sufficient skilled personnel on the Board and in management to even qualify for an investment banking
I license on most of the large capital markets in the world including the United States of America, United Kingdom and Hong Kong;

(2) Four out of five of the applicant's board members are former senior investment/merchant bankers while the compliance officer is also a former banker handling equities for Bank Pembangunan Malaysia Berhad;

(3) Both the founding directors were still with the applicant from the very beginning besides the fact that the applicant also had an independent director;

(4) Additionally, the applicant had also appointed a director who has over 28 years of experience in the Fund Management Industry to spearhead the business as CEO;

(5) All of these Directors have a combined experience of over 100 years in the financial services industry and such breadth and depths of experience were sufficient to conduct the business as per the CMSA guidelines and in the best interest of the clients and shareholders; and

(h) The respondent erred in holding that the applicant had poor understanding of regulatory requirements that the applicant had submitted inaccurate reporting to the respondent; had recurring findings on inadequate compliance programme; lack of regular compliance reviews on investment mandate; and terms of its investment management agreement deviate from regulatory requirements; when failing to consider the following facts:

(1) The applicant and its management had always given its utmost priority to the regulatory requirements and the applicant had strong understanding of the same; and

(2) Even though errors and mistakes might have happened, the applicant had always rectified any errors or mistakes found and/or detected promptly and in a timely manner.

(i) The respondent failed to consider the fact that the notice to show cause was issued to the applicant on 16 October 2018, which was more than eight months before the notice of revocation pursuant to s. 72 of the CMSA 2007 was issued to the applicant on 19 June 2019 and within this specific eight months period, the applicant had proactively taken all the material steps to comply with and make improvements to the weaknesses highlighted by the respondent since the receipt of the notice to show cause and this include:

(1) Appointment of qualified and competent individuals into the workforce of the applicant;

(2) Improved internal communications; and

(3) Updated policies and procedures in relation to AMLA.

(j) The respondent also failed to consider the fact that the applicant had tried numerous times to appoint certain individuals as key personnel in the applicant since October 2018 but on each occasion, the applications were either rejected and/or the applicant was asked to withdraw the applications without proper consideration and with no good reasons. In fact, the applicant was asked to withdraw its application to appoint a CEO for the reason that reply to the notice to show cause was pending. Thus, the respondent took the unreasonable and malicious stance that during the entire time the respondent was considering the replies to the notice to show cause, the applicant should not be permitted to address some of the main issues, namely the appointment of key personnel;

(k) The respondent erred in holding that the applicant had failed to comply with Compliance Guidelines on Compliance Function for Fund Management Companies when failing to consider that:

(1) The revised Compliance Program was established imminently after the last respondent's engagement and since then, it had been reviewed by the Board to commensurate the size of the business;

(2) The applicant was satisfied that the applicant's compliance programme was to commensurate with its business nature and size;

(3) The applicant had recruited an experienced former fund manager as the applicant's compliance officer about two months before the receipt of the notice of show cause from the respondent but the respondent refused, failed and/or neglected to process, consider, review and approve the application of the appointment and yet the respondent choose to cite the lack of experienced staff as one of the reasons in the show cause letter;

(4) Nevertheless, the person handling the compliance function in the applicant had reviewed reports, ensured and was satisfied that all the applicant's clients' portfolios were managed in accordance with the agreed mandates; and

(5) However, the new compliance officer could not approve the P&P until his appointment was approved by the respondent to which the respondent failed and/or refused to do so.

(l) Various attempts by the applicant to hold a meeting with the respondent to address any remaining issue was denied on the basis that the respondent was still considering the applicant's response to

their show cause letter whilst dismissing any or all the applicant's efforts to fully comply to the issues raised by the respondent in the show cause letter;

(m) The respondent erred in revoking the applicant's CMSL based on information that was obtained more than eight months prior to the notice of revocation without taking into account that during the eight months period, all the issues raised by the applicant in the show cause letter had been addressed by the applicant and the applicant had done all that was necessary to not only meet the requirements set by the respondent but had also improved its operation beyond the basic condition of the applicant.

(n) The respondent erred in holding that the applicant had from time to time failed to act in the best interest of its clients, when failing to consider the following facts:

(1) Since the applicant was granted the CMSL, there had not been a single customer complaint;

(2) None of the applicant's customers/clients had suffered any loss; and

(3) All the applicant's customers/clients in its history of being licensed had made profits as promised;

(ii) The respondent has acted in bad faith and committed errors of law apparent on the face of the record *inter alia* when it made the following decisions and/or interpretations after revoking the applicant's CMSL on 19 June 2019 and pending the disposal of the applicant's appeals:

(a) that the applicant was not licensed to deal in securities;

(b) that the applicant's appeal against the revocation of the CMSL will be only be reviewed by the respondent and not the Minister of Finance of Malaysia;

(c) that there is no stay of the revocation of the applicant's CMSL notwithstanding any appeal made by the applicant under s. 80(3) of the CMSA 2007 and the revocation would take effect on 19 June 2019 pursuant to s. 80(4) of the CMSA 2007; and

(d) that s. 80(3) of the CMSA 2007 is inapplicable to the applicant despite the lodging of the appeals by the applicant pursuant to s. 80(2) of the CMSA 2007;

Thus, a decision that resulted from a flawed, unreliable and distorted process of investigation has to be questioned for its good faith, credibility and soundness.

A **[4]** The respondent's decision to dismiss the applicant's appeal and to revoke the applicant's CMSL as well as the refusal to grant stay was tainted with bad faith based on the following grounds *inter alia*:

(i) The respondent made the decision to revoke the applicant's CMSL eight months after the applicant responded and replied to the respondent's notice to show cause and there was clearly a significant time gap between the issuance of the respondent's notice to show cause and the notice of revocation;

(ii) Despite alleging that the applicant was lacking in qualified workforce, the respondent continuously rejected and/or asked the applicant to withdraw its application to appoint key personnel with no apparent reason. At the time when the show cause letter was issued, the applicant, despite being a small organisation with only eight clients, had the following resources at its disposal:

(a) three former investment bankers on its Board;

(b) one former CEO of fund management division of an international Islamic bank as its director and proposed CEO;

(c) one former senior private equity manager of Bank Pembangunan as its compliance officer; and

(d) other experienced fund managers.

(iii) The respondent did not consider the actions and steps taken by the applicant within the eight months period in compliance with the respondent's notice to show cause and made the decision to revoke based entirely on the old grounds stated in the respondent's notice to show cause;

(iv) During the eight months period, there was no proper engagement or discussion on the matter and the respondent did not offer any opportunity to the applicant to clarify on any issues and/or situations and/or allegations stated in the respondent's notice to show cause even though the applicant had specifically highlighted in the applicant's letter to show cause that the applicant was willing to clarify on anything should the respondent require so;

(v) Although the applicant lodged a two-pronged appeal against the decision of the respondent, the respondent refused to stay the revocation and insisted that the applicant was to comply with the revocation letter;

(vi) The respondent stipulated that the applicant can only appeal to them but had in bad faith, instructed the applicant to close its business immediately upon the issuance of the revocation letter despite them having not processed or heard the merit of the applicant's appeal. As such if the appeal is to be in the favour of the applicant, the applicant would have nevertheless suffered irreparable damage and losses, which would have led to closure of its business. This clearly demonstrates the bad faith of the respondent;

(vii) Although the applicant had highlighted to the respondent (and the respondent itself has such knowledge) that it was a fund management company dealing in securities under s. 80(2) of the CMSA 2007 and so the stay of the revocation under s. 80(3) of the CMSA 2007 would apply, the respondent insisted otherwise and held that there would not be a stay of the revocation;

(viii) Although the respondent claimed that the revocation was for public interest, the respondent never explained exactly what the public interest was at stake and the respondent did not reply and/or respond to the applicant's letter asking for confirmation of stay of the revocation until the applicant sent another letter to the respondent;

(ix) The respondent claimed that it was in the public interest to close down the applicant's business with immediate effect through the letter of revocation even though the respondent waited eight months to do so for the applicant's reply to the notice to show cause. By waiting eight months, the respondent clearly demonstrated that there was no pressing public interest to warrant immediate closure;

(x) By highlighting alleged shortcomings and either refusing to examine that the purported shortcomings had been addressed or refusing to allow the applicant to address the purported shortcomings, the respondent demonstrated that they had clearly decided to close down the applicant's business despite whatever justifications provided by the applicant or may be additionally provided and further was not prepared to examine the steps that had been taken during the eight months since the notice to show cause. Such an attitude is clearly in bad faith;

(xi) The decision to revoke the applicant's CMSL is clearly disproportionate with the respondent's allegations;

(xii) The respondent only uplifted the directive under s. 125 against the applicant after almost two years of imposition, which deprived the applicant from conducting any business and earning any income while having to maintain full business operations to wholly comply with the respondent's licensing requirements. This was akin to creating a situation to cause the applicant to bleed to death;

(xiii) Further, during the meeting to discuss the upliftment of the s. 125 imposition sometime in May 2014, the applicant was informed that the respondent did not find any sufficient ground to revoke the applicant's licence and had therefore decided to uplift the imposition on grounds that there are room for improvement in the internal processes of the applicant, to which the applicant complied with.

[5] After detailed considerations of the applicant's application for judicial review (encl. 14), the statement filed pursuant to O. 53 r. 3(2) of the ROC 2012, the relevant affidavits filed by both parties, written submissions as well as oral submissions by both parties, I dismissed the applicant's application in encl. 14. The grounds for my decision appear below.

Background Facts

[6] The narration of the background facts herein is adopted with and/or without modifications from the statement and affidavit in support.

[7] The applicant was a fund management firm incorporated in Malaysia under the Companies Act 1965 that undertook on behalf of any other person the management of a portfolio of securities or derivatives or a combination of both, whether on a discretionary authority or otherwise as well as an asset or a class of asset in a unit trust scheme and dealt in securities, with a business address at Suite 2B-25-3a, Level 25, Block 2B, Plaza Sentral, Jalan Sentral 5, KL Sentral, 50470 Kuala Lumpur.

[8] The respondent is a body corporate established under the Securities Commission Malaysia Act 1993 (SCMA 1993) with a registered address at Persiaran Bukit Kiara, Bukit Kiara, 50490 Kuala Lumpur, Malaysia.

[9] The applicant held a CMSL which was granted by the respondent since 25 February 2008 pursuant to s. 61 of the CMSA 2007.

[10] Under the CMSL, the applicant was allowed to manage and deal in securities and derivatives pursuant to its role as a licensed Fund Manager.

[11] The respondent issued a letter of notice to show cause dated 16 October 2018 (respondent's notice to show cause) to the applicant for alleged breach of:

(i) Section 72(2)(a)(i) of the CMSA 2007 read together with s. 64(1)(j). Section 64(1)(h)(v) of the CMSA 2007;

(ii) Compliance Guidelines; and

(iii) Section 356(1)(a) of the CMSA 2007 read together with AML Guidelines.

[12] In responding to the respondent's notice to show cause, the applicant issued and replied *vide* a letter dated 31 October 2018 (applicant's reply to show cause) to the respondent to address and clarified on the issues raised by the respondent against the applicant.

[13] After a lapse of eight months from the date of the applicant's reply to the respondent, on 19 June 2019, the respondent *via* a letter revoked the applicant's CMSL pursuant to s. 72 of the CMSA 2007 (the revocation letter).

[14] The applicant was informed that the revocation of the applicant's CMSL would take effect from the date of the revocation letter pursuant to s. 80(4) of the CMSA 2007 and the applicant had to shut down its business with immediate effect.

[15] Dissatisfied, the applicant made a two-pronged appeal against the decision of the respondent whereby an appeal was made to the respondent under s. 80(1) of the CMSA 2007 *via* a letter dated 26 June 2019 and another appeal was made to the Minister of Finance under s. 80(2) of the CMSA 2007 *via* a letter dated 26 June 2019.

[16] Specifically, since the applicant had exercised its statutory right to appeal and especially under s. 80(2) of the CMSA 2007, the applicant highlighted to the respondent that s. 80(4) of the CMSA 2007 is therefore inapplicable and by virtue of s. 80(3) of the CMSA 2007, the revocation will only take effect after the disposal of the applicant's appeal and/or review by the Minister of Finance of Malaysia. A letter dated 26 June 2019 was sent to the respondent seeking the respondent's confirmation on the applicability of s. 80(3) of the CMSA 2007;

[17] No response by the respondent was forthcoming after the issuance of the applicant's letter dated 26 June 2019 and hence the applicant issued another letter dated 4 July 2019 to the respondent stating that the applicant deemed the stay of the revocation of the applicant's CMSL to be in effect pending the disposal of the applicant's appeal as there was no reply and/or response by the respondent to the applicant's letter dated 26 June 2019.

[18] On 5 July 2019, the respondent responded to the applicant's letters dated 26 June 2019 and 4 July 2019 and stated that:

(i) Since the applicant's CMSL is for fund management, the applicant's appeal will be reviewed by the respondent and not the Minister of Finance of Malaysia; and

(ii) The revocation letter invokes s. 80(4) of the CMSA 2007 and states that the revocation is to take effect on 19 June 2019 notwithstanding any appeal made under s. 80(3) of the CMSA 2007 and thus, there is no stay of the revocation pending disposal of the applicant's appeal.

[19] On 9 July 2019, the applicant filed an originating summons in the Kuala Lumpur High Court (Commercial Division) (OS) against the respondent for, amongst others, a declaration that the applicant was entitled for a stay of revocation of its CMSL pending the disposal of its appeals to both respondent and Minister of Finance.

[20] As soon as the OS was filed, the applicant filed an *ex parte* application for interlocutory injunction to injunct respondent from forcing the applicant to shut down its business with immediate effect.

[21] The applicant's *ex parte* injunction was later heard on *inter parte* basis on 16 July 2019 and 17 July 2019 and the learned judge in the OS dismissed the applicant's application for *ad interim* injunction pending the hearing of the *inter parte* injunction application on 16 August 2019.

[22] As a result of the dismissal of the applicant's *ad interim* injunction the applicant was forced to shut down its business and to comply with the revocation letter with immediate effect despite the fact that two appeals were still pending disposal.

[23] Meanwhile, the respondent also filed a striking out application on 16 July 2019 to strike out the applicant's OS on the basis that the applicant should pursue its cause of action *via* judicial review.

[24] On 19 August 2019 the learned judge in the OS allowed the respondent's striking out application with costs as the judge held *inter alia* that judicial review was a more appropriate mode of originating process as it involves the interpretation of s. 80 of the CMSA 2007.

[25] The respondent *via* a letter dated 17 September 2019 to the applicant, dismissed the applicant's appeal against the revocation of the applicant's CMSL.

[26] Hence, the judicial review application by the applicant.

The Law

[27] Judicial review may be granted on the grounds of illegality, irrationally and/or procedural impropriety.

[28] This principle can be found in the case of *Council of Civil Service Unions & Ors (CCSU) v. Minister for the Civil Service* [1985] AC 374, where Lord Diplock had this to say at pp. 410 and 411:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety' ...

> By 'illegality' as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality', I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (*Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ...
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred even where such failure does not involve any denial of natural justice.

[29] In the same case, Lord Roskill at p. 414 mentioned the following:

> Before considering the rival submissions in more detail, it will be convenient to make some general observations about the process now known as judicial review. Today, it is perhaps commonplace to observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described – by no means critically – as an upsurge of judicial activism. Historically, the use of the old prerogative writs of *certiorari*, prohibition and *mandamus* was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far, this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess. The second is where it exercises a power

A in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, *Wednesbury* principles (*Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1984] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'. As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often
B widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting place and be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner
C in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case, as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken. My noble and learned friend, Lord
D Diplock, in his speech, has devised a new nomenclature for each of these three grounds, calling them respectively 'illegality', 'irrationality' and 'procedural impropriety' – words which, if I may respectfully say so, have the great advantage of making clear the differences between each ground.

[30] Although *CCSU v. Minister for the Civil Service* has been assimilated into
E Malaysian jurisprudence through a plethora of cases, the Malaysian courts have, since the decision of the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1996] 1 MELR 71; [1996] 1 MLRA 725; [1997] 1 MLJ 145; [1997] 1 AMR 433, made inroads and held that decisions may be reviewed on grounds of illegality, irrationality and proportionality not only on the decision-making process but also on the
F merits.

Decision Of The Court

[31] Having perused the statement and affidavit in support of the applicant, I find that the basis in support of this judicial review application is
G overlapping with one another. In gist, it can be summarised as follows:

(i) The respondent had acted in bad faith and non-compliance with its statutory powers and functions;

(ii) The respondent's appeal decision was unreasonable and/or irrational
H and/or disproportionate. The respondent also failed to take into account relevant considerations in arriving at the decision; and

(iii) The respondent had committed errors of law after revoking the applicant's CMSL on 19 June 2019 which relates to the refusal to provide for a stay of the respondent's decision and in having the
I applicant's CMSL immediately revoked notwithstanding their appeal.

The Respondent Had Acted In Bad Faith And Non-compliance With Its Statutory Powers And Functions

[32] The applicant had submitted that the respondent's appeal decision was tainted with bad faith based on the following grounds:

(i) The respondent took more than eight months after issuing the notice to show cause to revoke the applicant's CMSL;

(ii) The applicant had tried numerous times to appoint qualified and competent individuals into the applicant's workforce. However, these applications were either rejected and/or the applicant was asked to withdraw the application without proper consideration and with no good reason;

(iii) There is no stay of the revocation of the applicant's CMSL notwithstanding any appeal made by the applicant under s. 80(3) of the CMSA 2007;

(iv) The respondent had decided that revocation should take immediate effect on 19 June 2019 notwithstanding that the applicant had the option to file an appeal to the respondent; and

(v) The respondent had revoked the applicant's CMSL despite it having lifted the directives imposed on the applicant pursuant to s. 125 of the CMSA 2007 in May 2014 as there were no sufficient grounds to revoke the applicant's CMSL at that time.

[33] The submission by the applicant that the respondent had acted in bad faith is a serious allegation. Therefore, the burden on proving bad faith lies with the applicant.

The Respondent Took More Than Eight Months After Issuing The Notice To Show Cause To Revoke The Applicant's CMSL

[34] It is to be noted that CMSA 2007 does not stipulate a timeframe within which the respondent must complete its deliberation on the applicant's explanation in response to show cause and notify the applicant of its decision.

[35] I am also of the opinion that since the nature of the applicant's breaches were of such a serious nature to warrant a revocation of the applicant's CMSL, time was required by the respondent to consider all facts and explanations given by the applicant prior to making the decision to revoke the applicant's CMSL.

[36] I also find that the applicant had failed to establish any prejudice it had suffered as a result of the purported delay. In fact, the applicant was entitled to carry out the operations during the eight months period.

[37] In the case of *Dato' Dr Mohamad Rameez Yahaya v. Lembaga Tatatertib Perkhidmatan Awam Kumpulan Pengurusan (No. 1) & Anor* [2019] 1 LNS 1027; [2019] MLJU 697 Nordin Hassan J (now JCA) held that there was no time-frame provided under the relevant law for a disciplinary action to complete and in the said case, for the second respondent to determine the final appeal by the applicant.

[38] Further in the case of *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573; [2008] 2 MLRA 273; [2008] 6 MLJ 1, the Federal Court held that delay in the disciplinary proceedings was not a ground to render the disciplinary decision null and void and held that:

> [34] The general orders do not provide for the time when a disciplinary action is required to be taken against any officer for a disciplinary offence. Applying the principles earlier stated that where procedure is provided by written laws then the courts should be wary of invoking common law, the delay, even if there was one, is not a ground for holding that there was a procedural unfairness.

[39] Coming back to the facts in the present case, I am of the view that the eight months period between the issuance of the notice to show cause and the revocation is not a ground for holding that there had been bad faith and/or procedural impropriety by the respondent.

[40] It was also the contention of the applicant that it was prohibited by the respondent from carrying out remedial steps during the eight months period. However, having perused the cause papers, I find that at no point in time did the respondent prohibit the applicant from carrying out such steps.

[41] Even if the remedial steps were taken by the applicant after issuance of the notice to show cause, I am of the opinion that it would not detract from the fact that the breaches were committed by the applicant.

The Applicant Had Tried Numerous Times To Appoint Qualified And Competent Individuals Into The Applicant's Workforce. However, These Applications Were Either Rejected And/Or The Applicant Was Asked To Withdraw The Application Without Proper Consideration And With No Good Reason

[42] It is the submission of the applicant that the respondent had failed to address on the timing of the applicant's applications for personnel and reasons for not approving the applications.

[43] On this issue, I have referred to the affidavit of Tuan Fadhlin Diana binti Tuan Kob from the respondent's Authorisation and Licensing Department who had affirmed an affidavit on 15 May 2020.

[44] Having perused Tuan Fadhlin Diana's affidavit at paras. 7(i), (ii), (iii) and (iv), I find that the respondent had set out the chronology of events in relation to the applicant's applications and the reasons for not approving processing of the same.

[45] From the reasons given by Tuan Fadhlin Diana that the respondent did not process the applicant's application for the appointment of various personnel in order to maintain the *status quo* and to protect the integrity of the administrative action process.

[46] It is also to be noted that the notice of revocation of the applicant's CMSL appeal decision letter was premised on:

(i) poor assessment of investment decisions;

(ii) failure to conduct itself in a professional manner in its dealings with the respondent; and

(iii) failure to act with due care, skill and diligence in the manner in which it conducted itself as a licensed fund manager.

[47] Therefore, based on the above it is clear that the issue of qualified personnel was not the sole ground relied on by the respondent in the revocation of the applicant's CMSL.

There Is No Stay Of The Revocation Of The Applicant's CMSL Notwithstanding Any Appeal Made By The Applicant Under S. 80(3) Of The CMSA 2007

[48] It is the submission of the applicant that after the revoking of the applicant's CMSL on 19 June 2019 and while pending the disposal of the applicant's appeals, the respondent has committed an error of law when it made the decision not to allow and stay of the revocation of the applicant's CMSL under s. 80(3) of the CMSA 2007 and the revocation would take effect on 19 June 2019 pursuant to s. 80(4) of the CMSA 2007.

[49] It is also the applicant's contention that it was entitled to file an appeal to the Minister of Finance (MOF) under s. 80(2) of the CMSA 2007.

[50] Having perused s. 80(4) of the CMSA 2007, I am of the view that the respondent may stipulate that any revocation of the CMSL shall take effect immediately on any date specified by the respondent if it is of the opinion that it is necessary in the interest of investors or public interest.

[51] From the facts of this case, it is clear that the respondent had invoked s. 80(4) of the CMSA 2007 as the respondent had found that the applicant no longer fit and proper to continue holding its CMSL for the regulated activity of fund and management due to the applicant's breaches as set out in the notice of revocation.

[52] Section 80 of the CMSA 2007 states as follows:

Appeals

80 (1) Any person who is aggrieved by the decision of the Commission under this Division except on the revocation of a Capital Markets Services Licence for dealing in securities or dealing in derivatives, may within fourteen days after the person has been notified of the decision, appeal in writing to the Commission to review its decision.

(2) A holder of Capital Markets Services Licence for dealing in securities or dealing in derivatives whose licence is revoked by the Commission may within fourteen days after the person has been notified of the decision, appeal to the Minister and the decision of the Minister is final.

(3) Where an appeal is made to the Commission or to the Minister under this section, the decision of the Commission shall not take effect until the appeal is disposed of.

(4) Notwithstanding subsection (3), the Commission may stipulate in the notification under subsection (1), that the decision of the Commission shall take effect immediately on the date when the notification is issued or on any other date as the Commission may specify, if the Commission is of the view that it is necessary in the interest of investors or public interest.

[53] Based on the above, it is my view that regardless of s. 80(3) of the CMSA 2007, the respondent may exercise its discretion to invoke s. 80(4) of the CMSA 2007, if it was of the opinion that it is necessary in the interest of investors or public interest.

[54] Section 80(4) of the CMSA 2007 begins with the word "Notwithstanding subsection (3)". Therefore, I view that s. 80(4) overrides the general position of s. 80(3) of the CMSA 2007 for the automatic stay. As a result, there was no stay of the revocation.

[55] Having perused the applicant's cause papers, I am of the view that the applicant's CMSL was for the regulated activity of fund management only. The applicant does not have any CMSL for the regulated activities of dealing in securities and/or derivatives. Therefore, the applicant is not entitled to the appeal mechanism under s. 80(2) of the CMSA 2007 to file an appeal to the MOF.

[56] I take the view that the appeal mechanism under s. 80(2) of the CMSA 2007 is only applicable to a holder of Capital Markets Services License for dealing in securities or dealing in derivatives whose licence is revoked by the respondent.

[57] It is the contention of the applicant that it can rely on s. 80(2) of the CMSA 2007 as the applicant's scope of work as a fund manager relates to dealing in securities and derivatives.

[58] However, I am of the opinion that the respondent being the sole licensing authority that grants CMSL for regulated activities under the CMSA 2007 would be in the position to ascertain whether the applicant's CMSL is for fund management only or for dealing in securities and/or derivatives as well.

[59] I am of the view that if this court were to make a finding that the applicant's CMSL was also for the regulated activities for dealing in securities and/or derivatives, this would be contrary to the fact that no such CMSL had been granted by the respondent to the applicant.

[60] It would also allow the applicant to circumvent the minimum financial requirements that would ordinarily have to be fulfilled by the applicant to obtain such CMSL.

[61] Further, I am of the view that once the applicant's CMSL had been revoked, to allow the applicant to continue carrying out its business in circumstances where the respondent had already found that the applicant was not to be fit and proper to continue operating as a licensed fund manager would be detrimental to the public interest since there was a risk that the applicant may continue to make investments on behalf of its existing clients and/or future clients in a manner which violates its investment mandates.

[62] The applicant also took the position that the respondent is estopped from taking the position that the applicant has no CMSL for dealing in securities and derivatives.

[63] It is my view the contention of the applicant is devoid of merits. The doctrine of estoppel does not apply in judicial review proceedings against a statutory authority ie, it cannot be used against the respondent when it is carrying out its statutory powers and responsibilities. (See *Tenaga Nasional Bhd v. Majlis Daerah Dungun* [2009] 4 CLJ 385; [2009] 6 MLJ 322; [2009] 1 MLRA 580).

[64] Further, having perused the applicant's statement, I find that the issue of estoppel was not pleaded and therefore, it is a non-issue and cannot be raised in this case, it is trite that parties are bound by their pleadings. (See *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 5 MLRA 696; [2010] 6 MLJ 1; [2011] 3 AMR 38).

[65] Further, I find the applicant's submission that there were no complaints or actual losses by the applicant's client to be a non-issue.

[66] The respondent's statutory and regulatory powers to revoke the applicant's CMSL in view of its breaches are not dependent on whether there had been complaints from the applicant's customer and/or losses suffered by the applicant's customer.

[67] This can be clearly seen in s. 72 of the CMSA 2007 which sets out the circumstances in which the respondent may revoke a CMSL. (See *Lembaga Jurutera Malaysia v. Leong Pui Kun* [2008] 6 CLJ 93; [2008] 2 MLRA 422; [2009] 2 MLJ 36).

[68] It is to be noted that the respondent is vested with the power to revoke the applicant's CMSL under s. 72(2)(a)(i) of the CMSA 2007 as the respondent had found that the applicant was no longer fit and proper to continue holding the CMSL since the applicant had failed to comply with paras. 4.02(h), 4.04(g)(k) and (o) of the Compliance Guidelines, paras. 6.3 and 13.1(c) of the AML Guidelines read together with para. 4.04(d) of the Compliance Guidelines and paras. 7 and 8.2.1(a) of the AML Guidelines.

[69] Based on the serious breaches of the CMSA 2007, Compliance Guidelines and AML Guidelines committed by the applicant, I am of the view that the revocation of the applicant's CMSL was therefore proportionate.

[70] I find that the applicant's allegation that the revocation was disproportionate is not substantiated.

[71] Further, it is my view that the issue of whether the revocation is proportionate to the applicant's serious breaches is a matter of regulatory discretion and this court should be slow to interfere with such discretion.

[72] Based on the above, it is my view that the respondent had exercised its powers within the ambit of the CMSA 2007 and in accordance with the respondent's statutory functions.

The Respondent Had Revoked The Applicant's CMSL Despite It Having Lifted The Directives Imposed On The Applicant Pursuant To S. 125 Of The CMSA 2007 In May 2014 As There Were No Sufficient Grounds To Revoke The Applicant's CMSL At That Time

[73] The applicant had submitted that the respondent had acted in bad faith in revoking the applicant's CMSL despite it having lifted the directives imposed on the applicant pursuant to s. 125 of the CMSA 2007 in May 2014.

[74] Upon perusal of the cause papers, I find that the respondent had lifted the directives imposed on the applicant pursuant to s. 125 of the CMSA 2007 by way of a written notice on 15 May 2014. The respondent had in the said notice reminded the applicant "to ensure continuous compliance with the Guidelines on Compliance Function for Fund Management Companies, securities laws and all relevant regulatory requirements".

[75] I find that the applicant had failed to act in the interest of its client. This failure, coupled with the various breaches by the applicant had led to the respondent's decision of revoking the applicant's CMSL with immediate effect.

[76] Therefore, it is my view that there is no error or irrationality by the respondent in imposing the revocation and in arriving at the respondent's appeal decision.

Whether This Court Should Disturb The Decision Of The Respondent

[77] Having perused the cause papers, I am of the opinion that the gist of the applicant's complaint relates to the merits of the decision of the respondent.

[78] It is to be noted that the respondent is the sole licensing authority of CMSL entrusted with the responsibility of regulating the capital market by ascertaining the fitness and propriety of companies and individuals applying for a CMSL in accordance with the relevant statutory provisions.

[79] Case laws seem to suggest that the courts would be reluctant on interfering with the decision of a regulatory body (ie, the Securities Commission) mandated under the law to maintain and promote the interest of public members and that regulatory body should be left to carry its objectives unless it acted in excess of jurisdiction. (See *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698; [2009] 4 MLJ 695; [2009] 2 MLRA 313; *Khiudin Mohd & Anor v. Bursa Malaysia Securities Bhd & Another Case* [2012] 7 CLJ 407; [2012] 6 MLJ 131; [2012] 5 AMR 59; [2013] 1 MLRH 323).

[80] Notwithstanding the above, having perused the issues raised by the applicant at para. 28 of the judicial review, I am of the opinion that the respondent had considered all facts, information and arguments raised by the applicant before arriving at the revocation and the respondent's appeal decision. This can be gleaned from:

(i) the grounds of revocation and the respondent's appeal decision as explained by the respondent to the applicant;

(ii) para.2 of the notice of revocation, where the respondent informed the applicant that the respondent "had reviewed and considered the applicant's response"; and

(iii) para. 1 of the appeal letter where the respondent had informed the applicant that the respondent "had deliberated on the applicant's appeal and considered all factors and information provided. After giving due consideration to all factors and information in the applicant's appeal, the respondent finds that the applicant has not satisfactorily explained why the respondent's decision and the revocation should be set-aside".

[81] I also notice that the respondent had carried out its supervisory functions in engaging with the applicant when it then discovered various breaches and having considered that these findings were serious, the respondent then issued the notice to show cause.

[82] Therefore, it is my view that it is entirely up to the respondent to then decide whether to accept it or to reject such explanation given by the applicant and this court should not substitute its own opinion for the decision made by a body which the Parliament had entrusted that function. (See *Dato' Low Tuck Choy v. Bursa Malaysia Bhd* [2012] 9 CLJ 119; [2011] 4 MLRH 191).

[83] In the present case, the respondent had exercised its statutory power and discretion to revoke the applicant's CMSL with immediate effect due to the serious nature of its breaches as it deem necessary to do so to protect the interest of investors or public interest.

[84] Based on the above, it is my view that there has not been any error of law, disproportionate and/or irrationality by the respondent in imposing the revocation and arriving at the respondent's appeal decision.

Whether This Court Should Grant An Order Of Mandamus Against The SC

[85] The applicant in its judicial review application is seeking for the *mandamus* order to direct the respondent to allow the applicant's appeal and to reinstate the applicant's CMSL. The effect of this *mandamus* order is essential to grant and/or reissue a CMSL to the applicant.

[86] The Federal Court in *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641; [2008] 1 MLRA 705, held that an order of *mandamus* can be granted either:

(i) under s. 44 of the Specific Relief Act 1950 (the SRA); or

(ii) the additional powers of the High Court provided by para. 1 of the Schedule to the Courts of Judicature Act 1964 (CJA).

[87] It is also to be noted that O. 53 r. 1(2) of the ROC 2012 provides that this order (O. 53) is subject to the provisions of Chapter VIII of Part II of the SRA.

[88] Therefore, any application for an order of *mandamus* made by way of judicial review proceedings must comply with the requirement of s. 44 of the SRA.

[89] Section 44 of the SRA reads as follows:

Enforcement Of Public Duties

Power to order public servants and others to do certain specific acts

44. (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that:

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(2) Nothing in this section shall be deemed to authorize a Judge:

(a) to make any order binding on the Yang di-Pertuan Agong;

(b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

[90] In *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56; [1972] 1 MLJ 180b; [1972] 1 MLRH 497, Sharma J had outlined four prerequisites essential to the issue of an order under s. 44 of the SRA or of a *mandamus*:

(i) Whether the applicant has a clear and specific legal right to the relief sought;

(ii) Whether there is a duty imposed by law on the respondent;

(iii) Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the respondent; and

(iv) Whether the applicant has any remedy, other than by way of *mandamus*, for the enforcement of the right which has been denied to him.

[91] Based on the case, in order to issue the order of *mandamus*, the applicant must show not only that he has a legal right to have the act performed but that the right must be so clear, specific and well-defined as to be free from any reasonable controversy. The order cannot be issued when the right is doubtful or is a qualified one or where it depends upon an issue of fact to be determined by the respondent. The failure to show the existence of any legal right to compel the performance of a legal duty cast upon the respondent will deny the order of *mandamus*.

[92] Another important hurdle that needs to be crossed by the applicant for an order of *mandamus* is to show that there is a duty imposed by law on the respondent.

[93] In *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123; [2010] 1 MLRA 325; [2010] 4 MLJ 360 the Court of Appeal held:

> [38] In *MP Jain's Administrative Law in Malaysia and Singapore*, second edn, 1980, the learned author said, at pp 449 and 450:
>
> *... Mandamus can be granted only when a legal duty is imposed on an authority and the applicant has a legal right to compel the performance of the public duty prescribed by law,* and to keep the subordinate bodies and officers exercising public functions within the limit of their jurisdiction. *Mandamus* is thus a very wide remedy which is available against a public officer to see that he does his duty.
>
> What can be enforced through *mandamus* is a duty of a public nature the performance of which is imperative and not optional or discretionary with the concerned authority. Thus, if an officer has a power rather than a duty, and he does not use his power, *mandamus* cannot be issued. (emphasis added)

[94] In *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* (*supra*), Petrojasa Sdn Bhd (the respondent) had obtained a monetary judgment at the High Court against the State Government of Sabah. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s. 33(1) of the Government Proceedings Act 1956 (the GPA). The party named in the certificate is the Government of Sabah. As the State Government of Sabah did not make payment as required by the certificate, the respondent filed an *ex parte* application for leave for judicial review for an order of *mandamus* against the Minister of Finance, Government of Sabah (the appellant) to pay the sum in accordance with the said certificate. Leave was granted. Nevertheless, the substantive application for judicial review was dismissed by the High Court.

[95] On appeal to the Court of Appeal, the court allowed the appeal by the respondent. The appellant, then obtained leave to appeal to the Federal Court on one issue that is s. 33(3) of the Government Proceedings Act 1956

imposes a statutory obligation on the Government of Sabah to pay according to a certificate issued under s. 33(1) of the Government Proceedings Act 1956. Thus, the issue is whether judicial review proceedings may be taken against the Minister of Finance, Government of Sabah to compel the payment according to a certificate issued under s. 33(1) of the Government Proceedings Act 1956 for a judgment for a monetary sum obtained against the State Government of Sabah.

[96] Arifin Zakaria FCJ (as he then was) in answering the question above held *inter alia*, after referring to several passages in the judgment of the Court of Appeal in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 2 MLRA 286; [1996] 3 AMR 3181; [1996] 1 MLJ 481 held that:

> [81] From the above, the position in law is that, **there is a duty on the part of the government to pay the amount stated in the certificate issued under s. 33(3) of the GPA to the respondent.** It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of *mandamus*. (emphasis added)

[97] Therefore, in that case 'to put right what was plainly wrong in law' an order of *mandamus* was issued by the court to command the appellant to pay the judgment sum as stated in the certificate. (See also *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145, [2018] 1 MLJ 545; [2018] 2 MLRA 1 (*Indira Gandhi*)).

[98] It is clear from the above apex courts' decisions that in both the above-mentioned cases of *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* and *Indira Gandhi*, the order of *mandamus* was issued based on the legal rights that the applicants had, that is the enforcement of a judgment of the court.

[99] Coming back to the facts in the present case, the *mandamus* order essentially seeks to reinstate the applicant's CMSL.

[100] Section 61 of the CMSA 2007 which governs the grant of a CMSL reads as follows:

> **61 Grant of licence**
>
> (1) Subject to subsection (3), **the Commission may grant a licence.**
>
> (2) ...
>
> (3) **In granting a licence, the Commission may:**
>
> (a) Specify and describe the regulated activity to which the licence is granted;

A (b) Specify any condition or restriction of the licence as the Commission thinks fit; or

(c) In the case of a Capital Markets Services Respresentative's Licence:

(i) Relate the licence to the holder of a Capital Markets Services B Licence which supported the application for the licence; and

(ii) Restrict the regulated activity of the licence to the regulated activity of the holder of a Capital Markets Services Licence which supported the application for the licence.

C (4) A person who contravenes any condition of, or restriction in, a licence commits an offence. (emphasis added)

[101] Based on the above, it is clear the express wording of s. 61 of the CMSA 2007 that the granting of a CMSL by the respondent under the CMSA 2007 is a matter of discretion and not a legal duty.

D **[102]** Based on the decided cases mentioned above, it is trite that where a statute imposes a duty, the performance or non-performance of which is not a matter of discretion, *mandamus* may be issued. But if an officer has power and not duty under the law, and if he does not use his powers, *mandamus* cannot be issued to compel him to exercise his power. (See *Tun Dr Mahathir* E *Mohamad v. Datuk Seri Mohd Najib Tun Hj Abdul Razak & Ors And Another Case* [2018] 8 CLJ 259; [2018] 8 MLJ 297).

[103] As such, it is my view that *mandamus* order cannot be granted against the respondent to compel the respondent to grant and/or reissue a CMSL to the applicant.

F **[104]** Further, I am of the opinion that to grant the *mandamus* order would allow the applicant to circumvent the application requirements that would ordinarily have to be fulfilled by the applicant to obtain a CMSL.

Whether The Publication Of The Revocation And The Dismissal Of The G *Applicant's Appeal Was In Accordance With The Respondent's Statutory Functions Pursuant To S. 152A Of The SCMA 1993*

[105] The respondent in publishing the revocation and the dismissal of the applicant's appeal was carrying out its statutory functions pursuant to s. 152A(a) and/or (g) of the SCMA 1993 for the interest of the public and H for the protection of investors as it was necessary and expedient to do so.

[106] The respondent has a public duty to ensure that the members of the public are properly informed of the applicant's various non-compliance with the provisions of the CMSA 2007, Compliance Guidelines and AML Guidelines.

I

[107] Section 152A of the SCMA 1993 was inserted by the 2007 Amendment Act for the purpose of bringing forward the capital markets regime in Malaysia to international standards.

[108] This has been reflected in the Hansard:

> Seksyen 150A yang baru dicadangkan untuk dimasukkan ke dalam SCA sedia ada. Peruntukan baru ini memperuntukkan bukti yang boleh diterima yang diperoleh melalui bantuan pihak berkuasa pengawal seliaan asing ke dalam mahkamah tempatan.
>
> *Seksyen 152A yang baru ini dicadangkan untuk dimasukkan ke daiam SCA sedia ada. Peruntukan baru ini akan membenarkan SC menerbitkan apa-apa maklumat yang dirasakan perlu untuk kepentingan awam atau untuk perlindungan pelabur.*
>
> Tuan Yang di-Pertua, selain daripada pindaan-pindaan di atas, pindaan-pindaan lain yang dicadangkan bagi menyelaraskan penggunaan terma di dalam peruntukan-peruntukan SCA memandangkan Bahagian IV, SCA akan dipotong dan dipindahkan ke Bahagian VI, Rang Undang-Undang PMP 2007.
>
> *Pindaan SCA ini adalah berkaitan dan berikutan dengan penggubalan Rang Undang-Undang PMP 2007, yang merupakan satu langkah penting dalam membawa pasaran modal Malaysia setaraf dengan standard antarabangsa.* Pindaan ke atas ACA adalah wajar dan perlu untuk mengelakkan pertindihan dan membolehkan kesinambungan peruntukan-peruntukan undang-undang pasaran dan perantara pasaran. (emphasis added)

[109] Therefore, I agree with the submission of the respondent that to argue that the respondent should not have published the revocation and the dismissal of the applicant's appeal would directly contradict Parliament's intention in enacting s. 152A of the SCMA 1993 to protect the interest of the public and investors.

Conclusion

[110] Based on the aforesaid reasons, it is my view that the respondent had at all times acted in good faith and in compliance with its statutory powers and functions.

[111] The decision of the respondent is not tainted with any errors of law, irrationality, procedural impropriety and/or disproportionality and is supported by evidence.

[112] As such, the applicant's judicial review is dismissed with costs of RM10,000 subject to allocator fee.